(21)

No. 04-1144

Supreme Court, U.S.
FILED
AUG 8 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF NEW HAMPSHIRE, IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST HEALTH
CENTER, FEMINIST HEALTH CENTER OF
PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF NEW HAMPSHIRE LEGISLATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

TERESA STANTON COLLETT
(*Counsel of Record*)
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
(651) 962-4996 FAX
tscollett@stthomas.edu

Counsel for Amicus Curiae

August 8, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF *AMICUS*	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. ABORTION PROVIDERS LACK STANDING SINCE THEY HAVE FAILED TO SHOW ANY CONCRETE IMMINENT INJURY CAUSED BY THE NEW HAMPSHIRE PARENTAL NOTIFICATION ACT	3
A. THERE IS NO EVIDENCE ABORTION PROVIDERS HAVE EVER TREATED MINORS WITH HEALTH CONDITIONS REQUIRING IMMEDIATE ABORTIONS	5
B. DR. GOLDNER HAS FAILED TO ESTABLISH INJURY IN FACT	8
C. ABORTION CLINICS DO NOT HAVE STANDING TO FACIALLY CHALLENGE STATUTES REGULATING THE PERFORMANCE OF ABORTIONS	11
II. RESPONDENT ABORTION PROVIDERS LACK THIRD-PARTY STANDING TO ASSERT THE PRIVACY RIGHTS OF FUTURE MINOR PATIENTS	13
A. ABORTION PROVIDERS HAVE FAILED TO ESTABLISH THEY HAVE SUFFERED AN INJURY IN FACT	14

TABLE OF CONTENTS – Continued

Page

B. ABORTION PROVIDERS DO NOT HAVE THE CLOSE RELATIONSHIP WITH MINORS NEEDING IMMEDIATE ABORTIONS, WHICH IS REQUIRED FOR THEM TO REPRESENT THE MINORS' INTERESTS 15

C. MINORS ARE CAPABLE OF ASSERTING THEIR OWN RIGHTS AND HAVE ROUTINELY DONE SO..... 17

III. THE *SALERNO* STANDARD REFLECTS THE NEED TO AVOID BROAD ADVISORY OPINIONS AND RESPECT THE JUDGMENT OF THE LEGISLATIVE PROCESS 19

IV. THE OVERBREADTH DOCTRINE APPLICABLE TO FIRST AMENDMENT CASES SHOULD NOT BE EXTENDED TO ABORTION CASES 22

V. REQUIRING HEALTH EXCEPTIONS IN PARENTAL INVOLVEMENT LAWS THREATENS TO RENDER SUCH LAWS ILLUSORY..... 24

A. REQUIRING A BROAD HEALTH EXCEPTION EFFECTIVELY RENDERS PARENTAL INVOLVEMENT LAWS VOID..... 24

B. PARENTAL INVOLVEMENT IS OF GREATER IMPORTANCE WHEN ABORTIONS ARE NECESSARY TO PRESERVE A MINOR'S HEALTH 26

VI. EVEN IF A *PER SE* RULE APPLIES, THE COURT SHOULD HAVE ENJOINED THE LAW ONLY AS TO MINORS IN NEED OF IMMEDIATE ABORTIONS 28

TABLE OF CONTENTS – Continued

Page

VII. THE DISTRICT COURT ERRED IN FINDING THE "DEATH EXCEPTION" IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE RESPONDENTS' DUE PROCESS RIGHTS..... 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) 17

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 9

Barrows v. Jackson, 346 U.S. 249 (1953) 13

Bellotti v. Baird, 443 U.S. 622 (1979) 17, 26

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 28

City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled on other grounds by Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992) ..... *passim*

C.L.G. v. Webster, 616 F.Supp. 1182 (W.D. Mo. 1985) 18

Coe v. Gerstein, 376 F.Supp. 695 (S.D. Fla. 1974), *aff'd*, 428 U.S. 901 (1976) 17

Colautti v. Franklin, 439 U.S. 379 (1979) 11, 29

Diamond v. Charles, 476 U.S. 54 (1986) 13

Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Doe v. Bolton, 319 F.Supp. 1050 (D.C. Ga. 1970) 4

Doe v. Exon, 416 F.Supp. 716 (D. Neb. 1975) 18

Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971) 18

Ellis v. Dyson, 421 U.S. 426 (1975) 9, 10

Foe v. Vanderhoof, 389 F.Supp. 947 (D. Colo. 1975) 18

TABLE OF AUTHORITIES – Continued

Page

Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 421 F.Supp. 734 (N.D. Ind. 1976), *aff'd*, 429 U.S. 1067 (1977) 18

Golden v. Zwickler, 394 U.S. 103 (1969) 10

Greenville Women's Clinic v. Commissioner, S.C. Dept. of Health and Environmental Control, 317 F.3d 357 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003) 12

Griswold v. Connecticut, 381 U.S. 479 (1965) 10

Hanrahan v. Doe, 410 U.S. 950 (1973) 18

Hayburn's Case, 2 U.S. 408 (1792) 21

H.B. v. Wilkinson, 639 F.Supp. 952 (D. Utah 1986) 18

H.L. v. Matheson, 450 U.S. 396 (1981) 6, 17, 24, 27

Hodgson v. Minnesota, 497 U.S. 417 (1990) ...2, 17, 22, 24, 30

Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 17

Kansas City Southern Ry. Co. v. Anderson, 233 U.S. 325 (1911) 20

Kowalski v. Tesmer, ___ U.S. ___, 125 S.Ct. 564 (2004) 16

Lady Jane v. Maher, 420 F.Supp. 318 (D. Conn. 1976), *aff'd by Maloney v. Lady Jane*, 431 U.S. 926 (1977) 18

Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4, 7

Madsen v. Women's Health Center, 512 U.S. 753 (1994) 11

TABLE OF AUTHORITIES – Continued

Page

Maher v. Roe, 432 U.S. 464 (1977) 17

Marbury v. Madison, 5 U.S. 137 (1803) 28

Margaret S. v. Treen, 597 F.Supp. 712 (E.D. La. 1984), *aff'd sub nom. Margaret S. v. Edward*, 794 F.2d 994 (5th Cir. 1986) 18

McConnell v. Federal Election Com'n, 540 U.S. 93 (2003) 21

New York v. Ferber, 458 U.S. 747 (1982) 22

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 21

Noe v. True, 507 F.2d 9 (6th Cir. 1974) 18

Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) 27

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 19

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) ..... *passim*

Planned Parenthood of Northern New England v. Heed, 390 F.3d 53 (1st Cir. 2004) 3, 4, 24

Planned Parenthood of Northern New England v. Heed, 296 F.Supp. 2d 59 (D.N.H. 2003) 3, 8, 29

Poe v. Ullman, 367 U.S. 497 (1961) 10

Poindexter v. Greenhow, 114 U.S. 270 (1885) 20

Powers v. Ohio, 499 U.S. 400 (1991) 14, 17

Roe v. Casey, 464 F.Supp. 487 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3rd Cir. 1980) 17

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Roth v. United States, 354 U.S. 476 (1957) 22

TABLE OF AUTHORITIES – Continued

Page

Sabri v. United States, 541 U.S. 600 (2004) 20

Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) 15

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 9

Singleton v. Wulff, 428 U.S. 106 (1973) ..... *passim*

St. Louis, Iron Mountain & S. Ry. Co. v. Wynne, 224 U.S. 354 (1912) 20

State v. Norflett, 337 A.2d 609 (N.J. 1975) 10

Steffel v. Thompson, 415 U.S. 452 (1974) 9

T.L.J. v. Ashcroft, 585 F.Supp. 712 (W.D. Mo. 1983) 18

Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004) 12

Turner Broadcasting Sys. Inc. v. F.C.C., 520 U.S. 180 (1997) 21

United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) 13

United States v. Ragen, 314 U.S. 513 (1942) 29

United States v. Raines, 362 U.S. 17 (1960) 20

United States v. Salerno, 481 U.S. 739 (1987) ..... *passim*

United States v. Vuitch, 402 U.S. 62 (1971) 29, 30

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 4, 28

Warth v. Seldin, 422 U.S. 490 (1975) 13

Watson v. Buck, 313 U.S. 387 (1941) 10

TABLE OF AUTHORITIES – Continued

Page

Whitmore v. Arkansas, 495 U.S. 149 (1990) 9

Wooley v. Maynard, 430 U.S. 705 (1977)..... 9

Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978)..... 18

Younger v. Harris, 401 U.S. 37 (1971)..... 9, 10

STATUTES

N.H. Rev. Stat. Ann. § 132:24-28 (2003) 1

N.H. Rev. Stat. Ann. § 132:26(I)(a) (2003) 30

N.H. Rev. Stat. Ann. § 132.28 (2003) 28

Tex. Fam. Code Ann. § 33.002 (Vernon 2001) 9

MISCELLANEOUS

Kevin Martin, *Stranger in a Stranger Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173 (1999)..... 21

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994)..... 21

Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 20 (MaureenPaul et al., eds. 1999) 27

Teresa S. Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L. Rev. 101 (2001) 9

STATEMENT OF INTEREST OF *AMICUS*[1]

Amicus is a group comprised of New Hampshire legislators, both past and present, who support the Parental Notification Prior to Abortion Act, N.H. Rev. Stat. Ann. § 132:24-28 ("parental notification act"). A complete listing of participating legislators is provided as appendix "A." The resolution of the present case will affect future regulations concerning abortion in the State of New Hampshire and throughout the United States. *Amicus* believes that its perspective will complement the brief of the Petitioner and assist the Court in the resolution of the issues.

STATEMENT OF FACTS

Amicus adopts the statement of facts in petitioner's brief.

SUMMARY OF ARGUMENT

This case presents issues of whether respondents may facially challenge a law requiring parental notification of abortions by minors on the basis of speculative injuries, and if so, what standard of review the courts should employ in reviewing the law.

Three foundational and interrelated concepts of the constitutional structure are presented – constitutional and prudential standing; the standard of review for abortion regulations; and severability. Each of these concepts bears upon the constitutionally-ordained separation of powers between the judicial and legislative branches. In this particular case, a sound understanding of these foundational constitutional concepts requires the courts to sustain the New Hampshire legislature's careful balancing of an

[1] No counsel for any party authored any portion of this brief. No persons other than *amicus curiae*, their members, or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

asserted liberty interest in maturing minors' seeking to obtain abortions with the universal and historically recognized right and obligation of parents to direct the medical care of their minor children.

First, the abortion providers challenging the New Hampshire law have failed to establish an actual case or controversy. Providing only general statements regarding those who seek their services, and broad descriptions of medical conditions suffered by a small number of women of unspecified ages, they demand a ruling that the New Hampshire law is unconstitutional. The lower courts accepted the respondents' generalities and inferred the necessary injury to establish respondents' Article III standing. By doing so, they disregarded this Court's repeated admonition that plaintiffs must show a concrete and imminent injury to establish a right to invoke the authority of federal courts. The lower courts then misread this Court's requirement that laws proscribing methods of abortion include a health exception and struck down the New Hampshire law, ignoring the fact that this Court "has never challenged a State's reasonable judgment that [a minor's abortion] decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (Stevens, J. concurring).

Second, the lower courts arrived at their erroneous conclusions by applying a *per se* rule regarding the necessity of a health exception to any abortion regulation. In doing so, they reversed the *Salerno* presumption of constitutionality which requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno*'s presumption lays down a broad, context-neutral standard of review that should be followed even-handedly in *all* constitutional cases, whether or not they involve abortion regulations. It reflects an appropriate and longstanding recognition by the courts that the other branches of government must be assumed to act constitutionally and the courts are bound to "save" a statute, to the

extent reasonably possible, from a challenge to its constitutionality. The lower courts, however, shifted the burden of proof to the state of New Hampshire to establish that the Act would be valid in *all* circumstances. "Even if these statutes could be cobbled together to preclude all civil and criminal liability for medical personnel who violate the Act's notice requirements in order to preserve a minor's health, we would not view them as equivalent to the constitutionally required health exception." *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004). *See also Planned Parenthood of Northern New England v. Heed*, 296 F.Supp. 2d 59, 65 (D.N.H. 2003). By adopting a standard that requires virtually perfect legislation in a politically divisive area riddled with plurality opinions by this Court, the lower courts allowed a few dissenting individuals to defeat the state political process from expressing the views of the New Hampshire legislature and citizens regarding the proper balance between an asserted liberty interest of minors seeking to obtain abortions without informing their parents, and the constitutional right of parents to direct the medical care of their children.

Third, the lower courts also departed from sound constitutional traditions by ordering an improper and unwarranted "remedy" that, again, upsets the Constitution's allocation of legislative and judicial powers. Such intrusion into the political process again reflects a mistaken conception of the judicial role and is unwarranted by the precedents of this Court.

ARGUMENT

I. ABORTION PROVIDERS LACK STANDING SINCE THEY HAVE FAILED TO SHOW ANY CONCRETE IMMINENT INJURY CAUSED BY THE NEW HAMPSHIRE PARENTAL NOTIFICATION ACT.

"[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he

personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . .'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 at 472 (1982). The requirement that the party bringing suit "must show that the action injures him in a concrete and personal way" is "not just an empty formality," but serves several significant purposes: "[i]t preserves the vitality of the adversarial process," helps ensure that "the legal questions presented [will] be resolved in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," and "confines the Judicial Branch to its proper, limited role." *Lujan,* 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment) (quotation marks omitted). Respondents ("abortion providers") have failed to meet this constitutional minimum.

The Court of Appeals for the First Circuit found the respondents to have standing on the basis of *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 62 (1976). *Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004). However the plaintiffs in *Danforth* challenged a comprehensive regulatory scheme containing a written consent requirement for every abortion, including those of adult women. In contrast, the abortion providers in this case seek only to challenge the emergency exceptions to a limited law applying only to minors seeking abortions. This narrow challenge does not result from any injury in fact to the respondents suitable to confer article III standing.

The physician-plaintiffs in *Danforth* established their standing to challenge most of the requirements of the Missouri statute by virtue of the fact that they were performing abortions at the time the lawsuit was initiated. *See id*. at 56-57, 62 & 66-67. (The Court declined to address the standing of the plaintiff abortion clinic. *Id.* at 62.) Similarly in *Doe v. Bolton*, 410 U.S. 179 (1973) the evidence established that plaintiff-physicians were "licensed physicians who wish to perform or counsel performance of legal abortions" challenging comprehensive abortion regulations. *Doe v. Bolton*, 319 F.Supp. 1050 (D.C. Ga. 1970). Perhaps more

importantly in *Doe*, and unlike the present case, the doctors were joined in their suit by Mary Doe a pregnant woman who was seeking an abortion prohibited by Georgia law. 410 U.S. at 185-86. In addressing the standing of the plaintiff-physicians, this Court wrote:

> Inasmuch as Doe and her class are recognized, the question of whether the other appellants – physicians, nurses, clergymen, social workers, and corporations – present a justiciable controversy and have standing is perhaps *a matter of no great consequence*.

Id. at 188 (emphasis added).

This case is thus easily distinguishable from *Danforth* and *Doe*, for two reasons. First, there is no minor plaintiff in the present case. Rather the New Hampshire law is challenged by three abortion clinics and one physician. Second, unlike plaintiffs in *Danforth*, abortion providers in the present case are not now performing, nor do they claim to have ever performed, abortions of the type which are the basis of their challenge to the statutory provisions at issue, namely emergency abortions for minors without parental notice. They therefore have not shown a "sufficiently direct threat of personal detriment" to establish Article III standing to sue. *Id.* at 188.

A. THERE IS NO EVIDENCE ABORTION PROVIDERS HAVE EVER TREATED MINORS WITH HEALTH CONDITIONS REQUIRING IMMEDIATE ABORTIONS.

In the complaint initiating this case, each of the abortion providers allege that "[a]mong [the individual plaintiff-respondent's] patients are unemancipated women under the age of eighteen who need abortions. [The individually named plaintiff-respondent] sues on its own behalf and on behalf of its minor patients." Complaint, ¶¶ 8-11. The complaint also contains an assertion that *women* [of an undisclosed age] experience various conditions that necessitate immediate abortions. *Id.* at ¶ 25 (emphasis added). Yet the evidentiary record, comprised only of the affidavits of

the complaining abortion providers, fails to include any evidence of respondents having ever treated a minor experiencing any health conditions necessitating an immediate abortion or threatened with death absent the performance of such an abortion.

Based upon pure speculation that 1) such health conditions could arise in a minor, 2) the minor would not be accompanied by a parent, 3) the minor would seek treatment from one of the three respondent abortion clinics or respondent physician, 4) the proper therapeutic response would be an immediate abortion, and 5) the minor would consent without involving a parent in her decision, the courts below ruled that the New Hampshire Parental Notification Act was unconstitutional. This speculative chain of events is clearly inadequate under Article III to support standing to assert a facial challenge to the New Hampshire law.

The abortion providers' claim in this case is similar in its deficiencies to that asserted by the minor in *H.L. v. Matheson*, 450 U.S. 396 (1981) or the childless married couple, "the Does," in *Roe v. Wade*, 410 U.S. 113 (1973). In *Matheson*, a fifteen-year-old minor sought to challenge Utah's parental notification law. However she did not allege nor establish that she was mature, nor did she establish any reason why notice to her parents would not be in her best interest. Similarly, the record did not establish that the abortion provider believed that notifying her parents would have adverse consequences. In fact, nothing in the record showed that the physician had any information about appellant's parents or familial situation, or even that he had examined appellant. *Id.* at 415. Therefore, this Court found that the minor had failed to establish standing to challenge Utah's law. *Id.* at 407.

In *Roe v. Wade*, the Does sought to challenge the Texas abortion law on the basis that Mrs. Does' health would be endangered if contraceptive measures were to fail and she were to become pregnant. She claimed that she would then desire, but be precluded from seeking a legal abortion by

Texas law. This Court recognized the Does had no standing and refused to hear their claim.

> This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy.

Id. at 128.

In the present case, no pregnant minor in New Hampshire may experience any serious health condition; or the minor may not seek treatment from one of the three respondent abortion clinics or respondent physician; or the minor experiencing the adverse health condition may be accompanied by a parent; or the proper therapeutic response may not be an immediate abortion; or the minor may not consent to the abortion. "Any one or more of these several possibilities may not take place and all may not combine," yet all are necessary for the abortion providers to be confronted with the need to perform an abortion that is not within the explicit terms of the New Hampshire law.

The evidentiary record provided by abortion providers is even more tenuous than the record found to be insufficient for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Unlike the plaintiffs in *Lujan*, the abortion providers have introduced no evidence of past conduct that is the subject of their challenge to the law. *See id.* at 562. Assuming *arguendo* that such evidence could be inferred from the statements within the abortion providers' affidavits, it is still insufficient to establish Article III standing.

> As we have said in a related context, "'Past exposure to illegal conduct does not in itself show a

> present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Lyons*, 461 U.S., at 102, 103 S.Ct., at 1665 (*quoting O'Shea v. Littleton*, 414 U.S. 488, 495-496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

Id. at 563-4.

The opinions of the lower courts should be reversed and the district court directed to dismiss the claims of respondents due to their lack of standing.

B. DR. GOLDNER HAS FAILED TO ESTABLISH INJURY IN FACT.

The declaration by Dr. Goldner, relied upon by the district court for the determination that "certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health," *Planned Parenthood of N. New England v. Heed*, 296 F.Supp. 2d 59, 65 (D.N.H. 2003), fails to establish anything beyond the general safety of abortion and the limited existence of certain health risks which may or may not affect minors and if so, may or may not be experienced by a patient of Dr. Goldner's. There is no evidence in the record that Dr. Goldner has ever treated a minor patient suffering from any of the conditions described in his declaration or that it is reasonable to believe that any future minor patient of Dr. Goldner will suffer from such conditions.

The experience in other states is instructive on this last point. During 2000, the first year the Texas Parental

Notification Act was implemented, 3,830 minors obtained abortions in Texas. During the same time period, the Texas Department of Health received no certificates of abortions performed upon minors under emergency circumstances. Such certificates are required by Tex. Fam. Code § 33.002(a)(4)(B) if a physician performs an emergency abortion. *See* Teresa S. Collett, *Protecting Our Daughters: The Need for the Vermont Parental Notification Law*, 26 Vt. L.Rev. 101, 126, n.126 (2001). Idaho public records reflect a similar lack of emergency abortions. *See id.* at 124-25. This point is developed more fully in the *amicus* brief submitted in this case on behalf of The Thomas More Society.

The experience of Texas and Idaho, particularly when viewed in light of the silent evidentiary record as to any actual health complications suffered by any of Dr. Goldner's patients, establishes the purely speculative nature of his case. In considering whether a prospective plaintiff has satisfied the "injury in fact" prong of Article III standing, the Court has always demanded a fair amount of common-sense realism: "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976); *see also Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (collecting cases holding that speculative future injury will not satisfy injury in fact).

In the final paragraph of his affidavit Dr. Goldner asserts "[t]he Act thus places me in fear of prosecution for fulfilling my duties as a physician, which is to proceed with my patient's safety as my paramount concern." This Court has made it clear that one challenging the validity of a criminal statute must show a threat of prosecution under the statute to present a case or controversy. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *Wooley v. Maynard*, 430 U.S. 705, 711-12 (1977); *Ellis v. Dyson*, 421 U.S. 426 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Younger v. Harris*, 401 U.S. 37, 41-42 (1971). The threat of prosecution must be "credible," *Babbitt*, 442 U.S. at 298, and "alive at each stage of the litigation." *Ellis*, 421 U.S. at 435. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate

plaintiffs." *Younger*, 401 U.S. at 42. A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws. *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Watson v. Buck*, 313 U.S. 387, 399 (1941). Even past threats of prosecution may not be sufficient to establish a controversy susceptible of resolution in federal court. *See, e.g., Ellis*, 421 U.S. 426. In short, potential litigants must show a threat of prosecution that is both real and immediate, *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969), before a federal court may examine the validity of a criminal statute.

Unlike defendants in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), Dr. Goldner has not been convicted of any crime related to providing abortions, nor does the record reflect any basis for reasonably fearing such a conviction since there is no evidence in the record that he has ever treated a minor patient suffering from any health conditions that would necessitate an immediate abortion.

Perhaps more importantly, searching both the Westlaw and Lexis electronic databases, counsel for *amicus* has been unable to locate a *single* federal or state case after 1973 when *Roe v. Wade* was handed down, involving the prosecution of a physician merely for the violation of a parental involvement law. The only case that results from the search, SY(ABORTION! & CRIM! & PROSECU!) & PARENT! is *State v. Norflett*, 337 A.2d 609 (N.J. 1975), a case involving a non-physician, who performed an abortion on a seventeen-year-old who suffered severe injuries as a result. A similar search of the news databases for the same time period fails to reveal any news stories of trial court actions that might not be reflected in the appellate opinions comprising the state and federal cases databases.

The lower court opinions are based upon the implausible assumptions that Dr. Goldner might someday encounter a minor patient who (1) is not accompanied by a parent, (2) suffering from a condition that threatens her health to such a degree that (3) it is medically appropriate to forego notifying one of her parents, and (4) immediately proceed with an abortion, and that (5) Dr. Goldner could credibly

fear that a New Hampshire district attorney would prosecute him for failing to give notice to the minor's parent, notwithstanding the fact that (6) no such prosecution appears to have ever occurred elsewhere in the United States, and (7) both the minor and the parents of the minor would probably be adverse witnesses to the state in light of Dr. Goldner's life-saving actions. Such imaginary harm simply does not meet the common-sense standard required for article III standing.

C. ABORTION CLINICS DO NOT HAVE STANDING TO FACIALLY CHALLENGE STATUTES REGULATING THE PERFORMANCE OF ABORTIONS.

Standing is not automatically conferred upon a party by virtue of being an abortion clinic. This Court has consistently declined to determine whether abortion clinics have independent standing to challenge regulations related to the performance of abortions. *E.g., Doe v. Bolton*, 410 U.S. 173, 189 (1973) ("We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations."); *Danforth*, 428 U.S. 52, 62, n.2 (1976) ("We decline to consider here the standing of Planned Parenthood to attack § 7. That question appropriately may be left to the District Court for reconsideration on remand."); *Singleton v. Wulff*, 428 U.S. 106, 109 (1973); *Colautti v. Franklin*, 439 U.S. 379, 383 n.3 (1979); and *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 440 n.30 (1983). Only in the context of regulating the free speech of those who oppose abortion has this Court recognized the standing of abortion clinics, independent of claims by plaintiff-physicians. *See, e.g., Madsen v. Women's Health Cent.*, 512 U.S. 753, 757 (1994) (conflict between abortion protestors and clinic operators).

The complaint in this case does not allege any injury that would normally provide independent standing for

abortion clinics. The alleged harm suffered by the respondents is set forth in ¶ 32 of the Complaint:

> The Act deprives plaintiffs of due process of law as protected by the Fourteenth Amendment to the United States Constitution by (a) subjecting plaintiffs to criminal prosecution and civil liability for providing abortions to prevent the minor's death without clearly providing that they reasonably rely on their good faith medical judgment in certifying that such abortions are necessary to prevent the minor's imminent death; (b) containing vague and/or conflicting terms that fail to give plaintiffs adequate notice of what conduct the law prohibits; and (c) placing an unduly high burden of proof on providers seeking to defend themselves against civil and criminal liability.

The record does not contain any evidence of harm suffered by the clinics *qua* clinics, nor does this case involve a challenge to laws seeking to directly regulate the practices of abortion clinics. *Cf. Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health and Envtl. Control*, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003); and *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004). The case does not involve a conflict regarding entry to the clinics.

The injuries complained of by the respondent-clinics are far too speculative to confer standing. Their fears of future prosecution are even more unrealistic than those of Dr. Goldner. There is no evidence in the record that any of the clinics have ever provided medical services to a minor experiencing any medical condition that necessitates an immediate abortion. More to the point, what little evidence the record does contain suggests that if clinics were to encounter such a minor, it is almost certain that the minor would certainly be accompanied by a parent. In ¶ 4 of Rachel Atkins' affidavit she states, "The vast majority of minors who obtain abortions from PPNNE [Planned Parenthood of Northern New England] in New Hampshire involve a parent in their decision." If the hypothetical minor suffering from the yet-to-be-determined medical conditions

appears, as Ms. Atkins' testified, in "the vast majority" of cases, she will be accompanied by a parent. This is the only evidence in the record regarding the experience of respondent-clinics. Thus based upon the record, any immediate abortion will be done with the knowledge of a parent, so the clinics will be in conformity with the law and under no threat of being the first defendants in the nation to be criminally prosecuted for violating a parental notice law. The lower courts erred in finding that the respondent-clinics had standing to pursue a facial challenge.

II. RESPONDENT ABORTION PROVIDERS LACK THIRD-PARTY STANDING TO ASSERT THE PRIVACY RIGHTS OF FUTURE MINOR PATIENTS.

As a general rule, a litigant lacks standing to assert the rights of others. *See United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (plurality opinion). Federal courts "must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (plurality opinion); *see also Barrows v. Jackson*, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[A plaintiff] must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (*quoting United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Thus, a plaintiff bears a heavy burden when attempting to litigate the rights of others.

In those rare instances in which this Court has allowed such "third-party standing," the Court has imposed a three-part test: (1) "[t]he litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relation to the

third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). All "three important criteria [must be] satisfied" for a litigant to possess third-party standing. *Id.* Abortion providers have failed to satisfy even one of these three requirements.

A. ABORTION PROVIDERS HAVE FAILED TO ESTABLISH THEY HAVE SUFFERED AN INJURY IN FACT.

Abortion providers in this case failed to present any evidence that they have ever provided an abortion to any minor suffering from any health condition that would necessitate an immediate abortion. This deficiency is not only fatal to their own standing, but also to their ability to assert claims on behalf of New Hampshire minors.

Singleton v. Wulff, 428 U.S. 106 (1976) (plurality opinion), is not to the contrary. In *Singleton* plaintiff-physicians' asserted both their own and their patients' rights to Medicaid reimbursement for abortions they performed in cases where the physicians had provided and anticipated continuing to provide abortions to low-income women. Four justices found third-party standing based upon the doctors' economic interests, while Justice Stevens found that the doctors' own constitutional rights were implicated. *Id.* at 121-22 (Stevens, J. concurring in part). Unlike the present case, not only did the doctors face the future loss of income, they were being denied payments owed to them for abortions already performed. *Id.* at 109; *id.* at 113. Present and future injury was simply not an issue as to the *Singleton* physician-plaintiffs.

Here, by contrast, the abortion providers seek relief from an injury they have not established even exists. Though respondents are abortion providers, they offered no evidence that they have ever provided an abortion to any woman suffering from any health condition that would necessitate an emergency abortion. Because the record does not show that respondents have, or have ever had, a relationship with any minors who would be denied immediate

abortions under New Hampshire's law, they have not suffered a cognizable injury. As Justice Rehnquist has observed, "[m]usings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 976 (1984) (Rehnquist, J. dissenting). Any injury they claim is simply hypothetical. This fact alone makes third-party standing inappropriate here.

B. ABORTION PROVIDERS DO NOT HAVE THE CLOSE RELATIONSHIP WITH MINORS NEEDING IMMEDIATE ABORTIONS, WHICH IS REQUIRED FOR THEM TO REPRESENT THE MINORS' INTERESTS.

In *Singleton* Justice Blackmun, writing for the plurality emphasized the confidential relationship between physicians and their patients. 428 U.S. at 117. Observing that "a woman cannot safely secure an abortion without the aid of a physician" and relying upon the "closeness of the relationship," (*id.*) he opined that physicians are "uniquely qualified" to represent the interest of those who oppose abortion regulations. *Id.* Five justices, however, refused to join in this portion of the opinion.

Four dissenting justices expressed grave concern regarding the ability of the Court to subsequently "cabin" in this exception to the requirement that parties litigate only their own interests.

> The Court quite recently stated, with respect to the rule against assertion of third-party rights as well as certain other doctrines of judicial self-restraint, that "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. . . . Constitutional judgments . . . are justified only out of the necessity of adjudicating rights

> in particular cases between the litigants brought before the Court." *Broadrick v. Oklahoma*, 413 U.S., at 610-611, 93 S.Ct., at 2915 (citation omitted). Today's holding threatens to make just such "roving commissions" of the federal courts.

Id. at 130-131 (Powell, J. concurring in part, dissenting in part). Justice Powell has proven prophetic. Based on the Westlaw search "SY(ABORTION) & DATE AFT 1976" of all federal cases from 1976 until July 22, 2005, there have been more than 1,000 federal opinions dealing with abortion, a majority of which were not initiated by women seeking to vindicate their individual rights.

Most recently in *Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564 (2004) this Court found that, notwithstanding the confidential nature of the attorney-client relationship, plaintiff-attorneys did not have the requisite standing to assert a third-party claim to state-funded appellate counsel on behalf of indigent defendants who had pled guilty or *nolo contendere* because the lawyers had no existing relationship with any indigent defendants denied appellate counsel. *Id.* at 568.

The present case is more similar to *Kowalski* than *Singleton*. In *Singleton* the plaintiff-physicians had rendered services to their patients, and were denied payment for those services due to the law they challenged. 428 U.S. at 109. Correspondingly in *Doe v. Bolton* and *Danforth* the plaintiff-doctors challenged comprehensive regulatory schemes effecting their present relationships with patients seeking abortions. *See Doe v. Bolton*, 410 U.S. at 188; *Danforth*, 428 U.S. at 62. Here, there is only one plaintiff-physician challenging a limited portion of the New Hampshire parental notification law on behalf of future minor patients who, the lower courts inferred, theoretically might experience rare medical conditions. To paraphrase a holding of this Court, "[t]he abortion providers before the Court do not have a 'close relationship' with their alleged 'patients'; indeed, they have no relationship at all." *Cf. Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 568 (2004).

C. MINORS ARE CAPABLE OF ASSERTING THEIR OWN RIGHTS AND HAVE ROUTINELY DONE SO.

Before the abortion providers can assert the interests of their patients, "there must exist some hindrance to the third party's ability to protect his or her own interest." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The four justices who accepted the physicians' claim to represent patients' interests when challenging abortion regulations in *Singleton* identified only two hindrances to patients asserting their own interests – a woman's desire to maintain her privacy regarding the decision to obtain an abortion, and the fact that litigation would be rendered moot by birth or termination of the pregnancy. 428 U.S. at 117-118. However, as the *Singleton* plurality notes, these are hardly insurmountable barriers to the assertion of constitutional rights. Women desiring to challenge abortion laws can proceed under a pseudonym, and the mootness doctrine has been sharply restricted in abortion cases since an unwanted pregnancy is "capable of repetition yet evading review." *Singleton*, 428 U.S. at 118, *quoting Roe v. Wade*, 410 U.S. 113, at 124-125 (1973). While one might suspect that minors are less able than adult women to protect their constitutional interests, the large number of federal cases in which pregnant minors have participated as plaintiffs clearly demonstrates the contrary.[2] *Cf. Powers v. Ohio*, 499 U.S. 400, 414

---

[2] *See Hodgson v. Minnesota*, 497 U.S. 417, 430 (1990) (six pregnant minors), *H.L. v. Matheson*, 450 U.S. 398 (1981) (fifteen-year-old minor), *Bellotti v. Baird*, 443 U.S. 622, 626 (1979) ("Mary Moe," an unmarried pregnant minor); *Maher v. Roe*, 432 U.S. 464 (1977) (Mary Poe, a 16-year-old high school junior); *Coe v. Gerstein*, 376 F.Supp. 695 (S.D. Fla. 1974), *appeal dismissed for want of jurisdiction, cert. denied sub nom Gerstein v. Coe*, 417 U.S. 279 (1974), *aff'd, sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom. Gerstein v. Coe*, 428 U.S. 901 (1976) ("Patricia Noe," a pregnant minor); *Akron Center for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988) (Patty Poe, an unmarried minor who believed she might be pregnant; and Rachel Roe, an unmarried minor who was refused an abortion due to the challenged statute), *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (Sally Boe and Jane Doe, two pregnant minors); *Roe v. Casey*,

(Continued on following page)

(1991) ("As a practical matter, however, these challenges [by prospective jurors excluded due to race] are rare.")

In *Kowalski v. Tesmer*, ___ U.S. ___, 125 S.Ct. 564, 569 (2004), the ability of indigent defendants to appear *pro se* constituted an adequate safeguard of those defendants' rights, persuading a majority of this Court to deny standing to plaintiff-attorneys. Justice Rehnquist, writing for the majority observed, "While we agree that an attorney would be valuable to a criminal defendant challenging the constitutionality of the [state-funded criminal defense] scheme, we do not think that the lack of an attorney here is the type of hindrance necessary to allow another to assert the indigent defendants' rights." *Id.* Similarly, even if minors seeking to challenge various abortion regulations found it desirable to be represented by physicians in certain instances, such desirability does not translate into "the type

---

464 F.Supp. 487 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3rd Cir. 1980) ("Plaintiff Moe," a pregnant thirteen-year-old minor); *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) (Jane Doe and Sally Roe, two unmarried minors under the age of eighteen, pregnant at the time of the filing of the suit); *Noe v. True*, 507 F.2d 9 (6th Cir. 1974) ("Nancy Noe," a pregnant fourteen-year-old minor); *Foe v. Vanderhoof*, 389 F.Supp. 947 (D. Colo. 1975) (Fatima Foe, a pregnant unmarried sixteen year with a five-month old child); *H.B. v. Wilkinson*, 639 F.Supp. 952 (D. Utah 1986) (seventeen-year-old pregnant minor); *C.L.G. v. Webster*, 616 F.Supp. 1182 (W.D. Mo. 1985) (seventeen-year-old pregnant minor); *Margaret S. v. Treen*, 597 F.Supp. 636 (E.D. La. 1984) *aff'd sub nom Margaret S. v. Edward*, 794 F.2d 994 (5th Cir. 1986) ("Linda S," a seventeen-year-old pregnant minor); *T.L.J. v. Ashcroft*, 585 F.Supp. 712, (W.D. Mo. 1983) (a seventeen-year-old minor); *Lady Jane v. Maher*, 420 F.Supp. 318 (D. Conn. 1976) *aff'd by Maloney v. Lady Jane*, 431 U.S. 926 (1977) (pregnant minors whose legal guardians are the Connecticut Commissioner of Children and Youth Services); *Gary-Northwest Indiana Women's Services, Inc v. Bowen*, 421 F.Supp. 734 (N.D. Ind. 1976) *aff'd by Bowen v. Gary-Northwest Indiana Women's Services, Inc.*, 429 U.S. 1067 (1977) (sixteen-year-old pregnant unmarried minor); *Doe v. Scott*, 321 F.Supp. 1385 (N.D. Ill. 1971), *vacated and remanded sub nom., Hanrahan v. Doe*, 410 U.S. 950 (1973) ("plaintiff Poe is a high school girl who was pregnant"); and *Doe v. Exon*, 416 F.Supp. 716 (D. Neb. 1975) (a seventeen-year-old pregnant minor).

of hindrance necessary to allow physicians to assert New Hampshire minors' rights in this case."[3]

III. THE *SALERNO* STANDARD REFLECTS THE NEED TO AVOID BROAD ADVISORY OPINIONS AND RESPECT THE JUDGMENT OF THE LEGISLATIVE PROCESS.

In the present case, like many involving laws regulating abortion, respondents brought their facial challenge prior to the implementation of the New Hampshire law. Notwithstanding the narrow basis of the abortion providers' complaint, and the minute number of minors, if any, that the claimed deficiency would impact under the respondents' theory of the case, the lower courts ruled the entire New Hampshire parental notification act unconstitutional. Yet this Court has long counseled the application of two principles in constitutional adjudication:

> [A federal court] has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885).

---

[3] The ability of mature minors to utilize the judicial system to vindicate their rights is evidenced by the judicial bypass system established by this Court as a constitutional requirement of parental consent laws. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 491-92 (1983).

A direct corollary to these principles is that one to whom application of a statute is constitutional may not attack the statute on the ground that the application of the statute to others may not be constitutional. *United States v. Raines,* 362 U.S. 17, 21 (1960). Another direct corollary is that a statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter v. Greenhow*, 114 U.S. 270, 304-05 (1885); *St. Louis, Iron Mountain & S. Ry. Co. v. Wynne*, 224 U.S. 354 (1912); *Kansas City S. Ry. Co. v. Anderson*, 233 U.S. 325 (1911).

In the context of facial challenges observation of these principles is of particular importance, for as this Court noted in its recent opinion of *Sabri v. United States*:

> Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of "premature interpretatio[n] of statutes" on the basis of factually bare-bones records.

541 U.S. 600, 124 S.Ct. 1941, 1948 (2004).

The *Salerno* rule recognizes the surreal aspect of facial challenges, particularly in the absence of any history of enforcement of the statute. Too often, as in this case, those who dissent from the political judgment of the people's representatives seek to use the courts to displace that judgment.[4] By requiring plaintiffs meet the *Salerno* standard in order to prevail in a facial challenge, this rule insures that courts, whose fact finding is limited to the parties before them, do not invalidate a statute that a

[4] Rachel Atkins, Vice President for Medical Services, Planned Parenthood of Northern New England, Betsy Schneider, Outreach Coordinator, Concord Feminist Health Center of Portsmouth, Brigit Ordway, Director of STD, HIV and Outreach Services, The Feminist Health Center of Portsmouth, and Wayne Goldner, M.D. appeared before the New Hampshire Senate Judiciary Committee on May 13, 2003, and testified against HB 763-FN, the legislation that became the New Hampshire parental notification act before the Court in this case.

federal or state legislature has determined to be constitutional and sound public policy on the basis of a much broader understanding of the facts surrounding the issues dealt with the legislation. *Cf. City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 455 (1983) *overruled on other grounds*; *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Turner Broadcasting Sys. Inc. v. F.C.C.*, 520 U.S. 180, 199 (1997).

Rather than reaching "draconian" results precluding recognition of constitutional liberties, as suggested by some academics,[5] *Salerno* is merely a specific application of this Court's historic refusal to grant advisory opinions, *see Hayburn's Case*, 2 U.S. 408 (1792), since the essence of the plaintiffs' claim when asserting a facial challenge is a demand that the federal courts advise plaintiffs on the constitutionality of the challenged statute in all its possible applications. Even when the challenged law has constitutional applications, as the majority of statutes will, and the facial challenge fails, plaintiffs retain the ability to challenge the law when, and if, it is unconstitutionally applied to them. *See* Kevin Martin, Note, *Stranger in a Stranger Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 Colum. L. Rev. 173, 195 (1999).

The application of *Salerno* is particularly appropriate in cases where legislatures are accommodating competing constitutional interests. *Cf. McConnell v. Federal Election Com'n*, 540 U.S. 93, 137 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402-03 (2000) (Breyer, J. concurring) (deference to legislature appropriate when reviewing laws "where competing constitutional interests are implicated, such as privacy"). In the present case, the New Hampshire law reflects the legislature's reference to this Court's jurisprudence, in that the disputed provision mirrors the Minnesota law approved in *Hodgson v. Minnesota*, and the balancing of the liberty interest of those few minors who are mature and seek to obtain abortions free of parental

[5] *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239-40 (1994).

influence or for whom parental involvement is not in their best interest, with the constitutional right and obligation of parents to direct the medical care of their minor daughters.

Without any doubt, application of the statute to the vast majority of New Hampshire minors is constitutional. *See Hodgson v. Minnesota*, 497 U.S. 417 (1990). The statute would have survived constitutional scrutiny had the lower courts applied the *Salerno* rule. Had the facial challenge been properly rejected in this case, the plaintiffs would still retain their ability to seek a determination regarding the constitutionality of the statute's application, should the need arise in the future.

IV. THE OVERBREADTH DOCTRINE APPLICABLE TO FIRST AMENDMENT CASES SHOULD NOT BE EXTENDED TO ABORTION CASES.

In *New York v. Ferber*, 458 U.S. 747 (1982) this Court articulated several principles regarding the "First Amendment overbreadth doctrine." *Id.* at 768. Key among these is the ideas that "overbreadth doctrine is 'strong medicine' and [courts] have employed it with hesitation, and then 'only as a last resort.'" *Id.* at 769. The doctrine is uniquely crafted for cases involving speech, which by its nature is a public activity, and a necessary precondition to maintaining a democratic republic. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). Overbreadth doctrine reflects a sense that First Amendment rights, as indispensable elements for a functioning constitutional democracy, are the necessary conditions for the exercise of all other constitutional rights; stand on a different and higher footing from them; and require especially heightened judicial attention.

The asserted liberty interest of mature minors, or minors for whom parental consent is not in their best interest, to obtain secret abortions is plainly not of the same constitutional magnitude. This asserted liberty interest is premised upon the idea that abortion is an inherently

private decision to be made between the minor and her doctor. *See Danforth*, 428 U.S. at 75 (1976). The public dimension of this interest, to the extent that one exists, is found in the minor's relationship with her family:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures
>
> . . . .
>
> Whatever choice a pregnant young woman makes – to marry, to abort, to bear her child out of wedlock – the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental-consent requirement will necessarily involve a parent in the decisional process.

Id. at 101, 103 (Stevens, J., concurring in part, dissenting in part). The values of autonomy and isolation underlying the liberty interest of the minor differ significantly from the values of association and connectedness foundational to the constitutional right of free speech.

If a law diminishes free speech, it may effect the entire community in a way that is not true of a law that impacts the liberty interest of minors seeking to obtain abortions absent parental involvement. The silencing of political or social dialogue threatens the very capacity of communal self governance. For that reason, this Court has crafted a more generous standard of review for First Amendment facial challenges.

A law that affects the liberty interest of minors seeking to obtain abortions absent parental involvement is limited in the scope of individual lives it effects if it creates unconstitutional burdens. At most it will impact the minor, the father of the fetus, the fetus, and the immediate families of the minor and of the father of the fetus. Although the lives of these people are important, such a range of individuals who might experience the possible effects of unconstitutionality is no different from that of any other non-First

Amendment law that may be facially challenged, and yet is governed by the *Salerno* rule.

"The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." *Matheson*, 450 U.S. at 412 (1981). To extend the overbreadth doctrine in this case would privilege the nontextual liberty interest of a minor to obtain an abortion without parental involvement over other constitutional rights – including both those that are explicitly set forth in the document's text, and those that are unenumerated. There is no foundation in Constitutional text, history or logic to treat a minor's interest in procuring an abortion without parental notice as a kind of constitutional superright. *Salerno* is the proper standard of review.

V. REQUIRING HEALTH EXCEPTIONS IN PARENTAL INVOLVEMENT LAWS THREATENS TO RENDER SUCH LAWS ILLUSORY.

The lower court found that New Hampshire was required to incorporate a health exception into its parental notification law. *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 59-62 (1st Cir. 2004). It reached this determination notwithstanding that the New Hampshire law was identical in pertinent part to the statute approved by this Court in *Hodgson v. Minnesota*, and respondents provided no evidence of having ever treated a minor experiencing any medical condition necessitating an immediate abortion.

A. REQUIRING A BROAD HEALTH EXCEPTION EFFECTIVELY RENDERS PARENTAL INVOLVEMENT LAWS VOID.

In arriving at its decision the lower court referred to this Court's discussion of the health exception in *Roe v. Wade*. *See Heed*, 390 F.3d at 58-59. In *Roe*, a broad definition of health was employed:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Roe v. Wade, 410 U.S. 113, 153 (1973). *See also Doe v. Bolton*, 410 U.S. 179, 192 (1973) (" . . . the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health."). If, as the Court of Appeals below suggests, states were required to incorporate a similarly broad health exception to parental notification laws, any requirement that a parent be notified prior to the performance of an abortion on her minor daughter becomes a sham.

A simple example illustrates this point. As members of this Court have noted, minors routinely miscalculate the response of their parents when confronted with the news of their daughters' pregnancies. Justices O'Connor, Kennedy, and Souter have observed that parental consent and notification laws "are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart." *Casey*, 505 U.S. at 895 (1992) (plurality). Justice Stevens has written:

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which

would in fact be loving, supportive, and, indeed for some, indispensable.

Danforth, 428 U.S. at 103-04 (Stevens, J., concurring in part, dissenting in part) (1976). When confronted with the fact that parents will learn of their pregnancies and intended abortions, it is quite natural that many minors will feel some emotional distress. If such ordinary feelings fall within the constitutional definition of a health risk, the number of minors who do not fall within the health exception may well approach zero, rendering the statutory duty of parental notification or consent nugatory.

B. PARENTAL INVOLVEMENT IS OF GREATER IMPORTANCE WHEN ABORTIONS ARE NECESSARY TO PRESERVE A MINOR'S HEALTH.

Even under the narrower definition of health approved by the plurality in *Casey*, there is little warrant for the lower court's ruling that the Constitution mandates secret access to abortion for all minors, regardless of maturity. This is especially true in light of the acknowledged medical benefits from parental involvement in a minor's decision to obtain an abortion.

In *Bellotti v. Baird*, this Court acknowledged the superior ability of parents to evaluate and select appropriate healthcare providers. 443 U.S. 622 at 641 (1979).

> In this case, however, we are concerned only with minors who, according to the record, range in age from children of twelve years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

Id.

Parental involvement laws also insure parents have the opportunity to provide additional medical history and information to abortion providers prior to performance of the abortion.

> An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

H.L. v. Matheson, 450 U.S. 398 at 411 (1981). Accord *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 518-19 (1990). This seems particularly important in cases where the abortion is a therapeutic response to a serious health condition.

The third way in which parental involvement improves the medical treatment of minors is by insuring that parents have adequate knowledge to recognize and respond to any post-abortion complication that may develop. *See Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 519 (1990). Some of the most serious post-abortion complications are delayed and may only be detected during the follow-up visit; yet, just one-third of all abortion patients actually keep their appointments for post-operative checkups. Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective, in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTIONS 20 (Maureen Paul et al., eds. 1999). In cases of immediate abortions due to serious health conditions, recovery will necessarily be impacted by the medical condition necessitating the abortion and require more careful monitoring.

Without knowledge of their daughters' abortions, parents cannot insure that their children obtain necessary post-operative care or provide an adequate medical history to physicians called upon to treat any complications that may arise. The first omission may allow complications such as infection, perforation, or depression to continue untreated. The second omission may be lethal. When parents do not know that their daughters have had abortions, ignorance may prevent swift and appropriate intervention

by emergency room professionals responding to life-threatening conditions.

VI. EVEN IF A *PER SE* RULE APPLIES, THE COURT SHOULD HAVE ENJOINED THE LAW ONLY AS TO MINORS IN NEED OF IMMEDIATE ABORTIONS.

Assuming *arguendo* that the lower courts properly attributed standing to the respondents, and that this Court is prepared to enforce a *per se* rule requiring inclusion of a health exception in parental notification laws, the lower courts failed to limit the remedy to reducing the overinclusiveness of the law. Since *Marbury v. Madison*, 5 U.S. 137 (1803) this Court has carefully limited its authority to provide the remedy sought by the plaintiffs, seeking to minimize its intrusion upon its other branches of government. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 at 473-74 (1982). Such careful discernment is missing from the lower court opinions in this case. Rather than enjoining enforcement only in the rare cases of minors suffering from medical conditions that necessitate immediate abortions, the lower courts enjoined the law in its entirety. Such intrusion into the political process is unwarranted by the precedent of this Court.

In determining whether to issue such a limited remedy, the question is whether it would be contrary to legislative intent. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985). The presence of a severability clause in the New Hampshire legislation at N.H. Rev. Stat. Ann. § 132.28 evidences the willingness of the legislature to have the Court alter the statutory scheme, where necessary to conform to constitutional pronouncements. *Cf. Casey*, 505 U.S. at 898 (invalidating only spousal notification provision of omnibus Pennsylvania abortion control act). By enjoining enforcement of the New Hampshire parental notification law in all instances, the lower courts disregarded their duty to tailor the relief to the scope of unconstitutional conduct.

VII. THE DISTRICT COURT ERRED IN FINDING THE "DEATH EXCEPTION" IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE RESPONDENTS' DUE PROCESS RIGHTS.

The lower courts erred in finding that the notification exception in the Act related to life-threatening circumstances must contain a scienter requirement in order to survive constitutional scrutiny. *Colautti v. Franklin*, 439 U.S. 379 (1979), cited by the District Court in support of its decision (*Heed*, 296 F.Supp. 2d at 66) specifically reserved the question whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible . . . " *Colautti* at 396. "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Even *Casey* recognized that the "life or health of the mother" exception may be invoked only when necessary "in appropriate medical judgment." *Casey*, 505 U.S. at 879.

In *United States v. Vuitch*, 402 U.S. 62 (1971), this Court rejected claims very similar to those raised by respondents below. Dr. Vuitch had successfully challenged his indictment under a D.C. statute on the basis that the statute was unconstitutionally vague. The statute provided:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years.

The government appealed, and the Court held that the phrase "necessary for the preservation of the mother's life or health," was not unconstitutionally vague. "Generally, doctors are encouraged by society's expectations, by

strictures of malpractice law and by their own professional standards to give patients such treatment as is necessary to preserve their health." *Id.* at 71. *See also Doe v. Bolton*, 410 U.S. 179 at 191-192 (1973) (upholding abortion statute against claim of vagueness in cases where abortion to be provided on the basis of physician's "best clinical judgment" that abortion is "necessary.").

This Court's precedent makes clear that the exception contained in N.H. Rev. Stat. Ann. § 132:26(I)(a) (2003) is not unconstitutionally vague, nor does it impermissibly burden plaintiff physician's due process rights.

CONCLUSION

The abortion providers in this case prevailed below on mere speculation. Disregarding the most relevant precedent of this Court in *Hodgson v. Minnesota*, these courts erroneously embraced a standard of review that disregards the superior fact-finding ability of the legislative branch and the traditional deference shown to legislative judgments on contentious social issues. For all the foregoing reasons, *amicus* respectfully urges the Court to vacate the judgments of the lower courts and remand to the district court with instructions to dismiss the case for want of standing, or in the alternative to reverse the judgments of the lower courts.

Respectfully submitted,

TERESA STANTON COLLETT
(*Counsel of Record*)
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2015
(651) 962-4973
(651) 962-4996 FAX
tscollett@stthomas.edu

Counsel for Amicus Curiae

APPENDIX A

Present Representatives

Rep. Nelson S. Allan
Rep. Laurie Boyce
Rep. Robert W. Brundige
Rep. Dave Buhlman
Rep. W. Packy Campbell
Rep. Sam A. Cataldo
Rep. Lars T. Christiansen
Rep. Timothy E. Easson
Rep. Nancy Elliott
Rep. William Field
Rep. Robert J. Giuda
Rep. Carlos Gonzalez
Rep. Ryan N. Hansen
Rep. Ken Hawkins
Rep. James Headd
Rep. Peyton B. Hinkle
Rep. Margie Maybeck
Rep. Robert Mead
Rep. Paul Mirski
Rep. Maureen C. Mooney
Rep. Beverly T. Rodeschin
Rep. Lee G. Slocum
Rep. Tony F. Soltani
Rep. Gregory M. Sorg
Rep. Jordan G. Ulery
Rep. Kevin K. Waterhouse
Rep. Fran Wendelboe
Rep. James E. Wheeler

Present Senators

Sen. Bob Clegg

Past Representatives

Hon. Omer C. Ahern, Jr.
Hon. William Beaton
Hon. Pierre W. Bruno
Hon. Mark S. Derby
Hon. Terri C. Dudley
Hon. Ron Dupuis
Hon. George Michael Gilman
Hon. Gary S. Hopper
Hon. Paul G. LaFlamme, Jr.
Hon. John J. Laurent
Hon. Henry P. Mock
Hon. David Scott
Hon. Paul C. Smith
Hon. Phyllis Woods

Past Senators

Sen. Russell Prescott